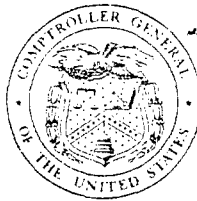


DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

9255 Proc L
GAO 00045-

FILE: B-193086

DATE: February 28, 1979

MATTER OF: Sea Containers, Inc.

DIGEST:

[Protest Concerning Sale of S.S. UNITED STATES]

1. Letter from Sea Containers constitutes protest; Sea Containers, although in less than precise terms, lodges specific exceptions to negotiation process used by MarAd in sale of S. S. UNITED STATES.
2. Pub. L. No. 92-296 does not prescribe any particular method for sale of S. S. UNITED STATES. Secretary of Commerce is given broad discretion in conducting such sale. GAO will not object to sale in absence of convincing evidence of abuse of discretion. Failure to include other parties in negotiation after five unsuccessful attempts to sell competitively does not constitute abuse of discretion.

~~DLG 00738~~ DLG 00738

Sea Containers, Inc. (Sea Containers), protests the sale of the S. S. UNITED STATES by the Maritime Administration (MarAd), United States Department of Commerce, to United States Cruises, Inc. (USCI), under Contract of Sale No. MA-9132, September 29, 1978. This contract resulted from negotiations between MarAd and USCI which began in mid-August 1978. Sea Containers claims that it should have been offered the opportunity to participate in these negotiations.

The S.S. UNITED STATES was acquired by the Government on February 6, 1973, under the authority of Pub. L. No. 92-296, sec. 2, 86 Stat. 140 (1972); 46 U.S.C.A. § 1160, note (1975). This law directed the Secretary of Commerce to purchase the vessel for layup in the National Defense Reserve Fleet or for sale or charter to a qualified operator for operation under the American flag. The Secretary of Commerce delegated his authority under Pub. L. No. 92-296 to the Assistant Secretary for Maritime Affairs, chief executive of MarAd.

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On February 26, 1973, MarAd published a notice soliciting proposals from qualified operators interested in the purchase or charter of the vessel. None of the responses was satisfactory. In a second effort to sell the vessel, MarAd issued invitation for bids (IFB) No. PD-X-969 on November 9, 1973. The S. S. UNITED STATES was offered for sale to United States citizens for operation under the American flag at a minimum price of \$12,100,000. Among the other terms of the IFB was a provision requiring that each bid be submitted with a 10-percent bid deposit. None of the replies received under this IFB were accompanied by the bid deposit; thus, all were rejected. On August 11, 1975, MarAd published IFB No. PD-X-999, by which it offered the vessel for sale for a third time. The minimum bid price was lowered to \$7,500,000, but a 10-percent bid deposit was again required. None of the bids submitted were accompanied by the deposit.

In view of MarAd's failure to sell the vessel under the limitations of Pub. L. No. 92-296, this law was amended on October 17, 1976, by Pub. L. No. 94-536, 90 Stat. 2497, to allow the sale of the S. S. UNITED STATES for use as a floating hotel in or on the navigable waters of the United States. The Ship/Shore Hotel Corporation had expressed an interest in purchasing the vessel for use as a hotel and a tourist attraction in Boston. Pub. L. No. 94-536 was enacted in response to this interest. House Committee on Merchant Marine and Fisheries, H. R. Rep. No. 94-1339, p. 4 (July 13, 1976).

H. Rep. 94-1339

Acting with expanded authority, MarAd offered the S. S. UNITED STATES for sale a fourth time under IFB No. PD-X-1013, published on December 3, 1976. The minimum bid price was reduced to \$5,000,000; a 10-percent bid deposit was required with each bid. As before, none of the bids were submitted with the bid deposit. Subsequently, MarAd was informally approached by two firms offering to purchase the vessel for use as a floating hotel/casino in Atlantic City. So, MarAd offered the vessel for sale for a fifth time under IFB No. PD-X-1029, published April 21, 1978, with substantially the same terms of sale as under the previous IFB. Again, no bid was accompanied by the required 10-percent bid deposit.

One of the unsuccessful bidders under IFB No. PD-X-1029 was USCI. One reason USCI's bid was found to be nonresponsive was that it failed to provide the required bid deposit. In mid-August 1978, USCI indicated to MarAd a willingness to negotiate the purchase of the vessel. USCI's offer to purchase the S.S. UNITED STATES met the terms required by MarAd. Since USCI's offer was acceptable, a contract, MA-9132, was executed on September 29, 1978. It is this action which Sea Containers protests.

Sea Containers challenges the manner by which the S.S. UNITED STATES was sold. It claims that it had actively pursued the possibility of purchasing the vessel for at least the past 5 years. Yet, despite the fact that numerous officials of MarAd were aware of this continuing interest, Sea Containers was never offered an opportunity to participate in negotiations for sale of the vessel and was never officially informed that negotiations were taking place. The protester alleges that MarAd's intention to sell the S.S. UNITED STATES through negotiation should have been published in the Federal Register as were all other attempts to sell the vessel. Alternately, MarAd could have notified prospective purchasers of the possibility of a negotiated sale.

Sea Containers also expresses concern that MarAd will provide USCI with mortgage guarantees under title XI of the Merchant Marine Act of 1936, as amended. 46 U.S.C. §§ 1271-1280 (1970). Sea Containers offered to withdraw its protest if MarAd would agree not to approve an application by USCI for a title XI mortgage guarantee or any other form of financial assistance. As of December 20, 1978, USCI had neither applied to MarAd for aid nor indicated an intention to apply for aid. The contract between MarAd and USCI does not address the possibility of USCI receiving a title XI mortgage guarantee or any other financial assistance from MarAd.

As a threshold issue, MarAd questions whether Sea Containers ever actually protested as required under GAO's bid protest procedures, 4 C.F.R. § 20.1(c) (1978). MarAd argues that Sea Containers never submitted a

statement of the grounds for its protest nor a specific request for a ruling. Compliance with our procedures requires that a letter of protest to our Office include the protester's name and address, identification of the contracting activity and the contract number, a statement of the grounds of protest, and a specific request for a ruling by the Comptroller General. Our Office has previously held that such a letter need not contain exact words of protest to be characterized as a formal bid protest as long as it can be understood as lodging specific exceptions to the particular procurement procedure. TM Systems, Inc., 56 Comp. Gen. 300 (1977), 77-1 CPD 61; Eocom, Inc., B-185345, March 25, 1976, 76-1 CPD 196; Johnson Associates, Inc., 53 Comp. Gen. 518 (1974), 74-1 CPD 43. A submission that is reasonably understood as a protest may be considered as such, notwithstanding the firm's failure to specifically request a ruling as required. TM Systems, Inc., supra.

We believe that the submissions from Sea Containers meet the requirements of 4 C.F.R. § 20.1(c). Although the contract number was never identified, Sea Containers did meet the other requirements. The protester's name and address were given, and the contracting activity was identified. The following grounds of protest were submitted by Sea Containers:

- (1) Sea Containers was never given an opportunity to participate in the negotiations which resulted in the sale of the S.S. UNITED STATES;
- (2) MarAd never gave prospective purchasers of the vessel notice of the negotiations.

While Sea Containers at various times asks for an investigation by GAO of the circumstances of the sale, it also specifically requested a ruling by GAO in its letter of October 11, 1978. Thus, we will address the merits of Sea Container's protest.

Relying primarily on the argument that the protest should be dismissed for failing to meet the requirements of 4 C.F.R. § 20.1(c)(3), (4), MarAd does not address in any detail the grounds of the protest. The agency, however, does deny the existence of any requirement that

it publish an announcement of the negotiations in the Federal Register or that it issue an invitation for bids. MarAd asserts that the sale of the vessel was proper and within the authority of Pub. L. No. 92-296.

We agree with the agency that the sale was properly conducted under Pub. L. No. 92-296. This law was enacted in response to the distressed condition of the American passenger vessel industry. By 1971, American passenger vessels had been operating at a deficit for some time, and most had been placed in an inactive status. Studies showed that, for various reasons, the operation of passenger vessels under the American flag was no longer economically feasible. However, construction of many had been paid for in part by construction--differential subsidies under the Merchant Marine Act of 1936, 46 U.S.C. § 1153 (1970). For this reason, the vessels were required to remain documented under United States laws for a period of 25 years. This precluded sale of the vessels to foreign registry without specific statutory authority. Pub. L. No. 92-296 was enacted to provide such authority. House Committee on Merchant Marine and Fisheries, H. R. Rep. No. 92-617, November 5, 1971.

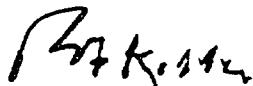
The S. S. UNITED STATES was determined to be a special case, though. This vessel was deemed to have significant national defense features. To insure that these features would not be removed or altered so as to destroy the value of the vessel in times of national emergency, its disposition was limited. Pub. L. No. 92-296 directed the Secretary of Commerce (Secretary) to purchase the vessel for layup in the National Defense Reserve Fleet or for sale, with certain conditions attached. A decision was made to sell it. This law did not prescribe any particular method of sale.

The sale of surplus vessels generally is controlled by the Merchant Marine Act of 1936 and other laws authorizing such sales. See 40 U.S.C. § 484(i) (1976). Normally, vessels which can still be operated in commerce are required to be sold at a competitive sale after due advertisement. 46 U.S.C. § 864 (1970). The S.S. UNITED STATES, however, was not acquired by MarAd under the general authority of the Merchant Marine Act of 1936. See 46 U.S.C. § 1125 (1970). Instead, it was acquired pursuant to the specific statutory authority of Pub. L. No. 92-296. Thus, its sale is not controlled by the general sales procedures under which MarAd normally operates.

In light of the special circumstances necessitating the enactment of Pub. L. No. 92-296, it seems that Congress intended to vest in the Secretary considerable discretion in the sale of the S.S. UNITED STATES. Although the legislative history provides no assistance in defining the method of sale, we believe the absence of restrictions or guidelines in the law itself is a clear indication of such an intent. We do not believe it would be proper for our Office to object to MarAd's sale of the vessel to USCI unless convincing evidence is presented that such action was an abuse of discretion. We see no basis in the information presented to us by Sea Containers upon which we could properly conclude that there has been an abuse of discretion.

MarAd attempted to sell the S.S. UNITED STATES competitively five times. The most recent effort was concluded approximately 1 month prior to the beginning of negotiations with USCI. These efforts, while more than adequate, were unsuccessful in that no responsive bids were received. MarAd informs us that Sea Containers first expressed an interest in obtaining the S.S. UNITED STATES on March 19, 1973. However, the protester never responded to any of the four formal IFB's issued between 1973 and 1978. Sea Containers periodically contacted MarAd to inquire as to the status of the vessel; but, there is no indication of a strong interest in purchasing the vessel. Furthermore, while the agency did not announce its intention to conduct negotiations with USCI, we have no evidence that MarAd and USCI negotiated in secret or that MarAd deliberately intended to exclude other interested parties from the negotiations. The terms of this contract were not substantially different from the terms offered in the last IFB, issued April 21, 1978. Thus, we do not find that negotiating a contract with USCI to the exclusion of Sea Containers was an abuse of discretion.

Accordingly, the protest is denied.



Deputy Comptroller General
of the United States